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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Infrastructure) CC Docket No. 96-237
Sharing Provisions in the)
Telecommunications Act of 1996)

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To: The Commission

COMMENTS OF
OCTEL COMMUNICATIONS CORPORATION

OCTEL COMMUNICATIONS CORPORATION ("Octel"), through its attorneys, hereby submits brief comments in response to the *Notice of Proposed Rulemaking* ("Notice")¹ regarding implementation of the infrastructure sharing provisions of new section 259 of the Communications Act of 1934, as amended (the "Communications Act").² Octel responds to the *Notice* on a very narrow aspect of the Commission's infrastructure sharing proposals—the protection of proprietary information and property of third party service providers.

Octel is the leading supplier of voice processing systems (e.g., voice mail) to large and small businesses, institutions, government agencies, and telecommunications service providers (including Regional Bell Operating Companies ("RBOCs"), independent telephone companies, wireless communications companies and service bureaus). Octel's Voice Information Systems group provides these systems to telecommunications service providers, including the incumbent local exchange carriers ("LECs") that are the subject of the *Notice*. Octel has license agreements with all incumbent LEC customers of its

¹ FCC 96-456, released November 22, 1996. The *Notice* called for comments to be filed by December 20, 1996 and reply comments to be filed by January 3, 1996.

² Section 259 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

voice processing systems.³ These license agreements restrict the use of Octel's voice processing systems and require the licensee to maintain the confidentiality of Octel's underlying proprietary information.

Section 259(a) of the Communications Act requires the Commission to prescribe regulations that require incumbent LECs

to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services

47 U.S.C. § 259(a). The *Notice* requests comment on the proper scope of the incumbent LEC requirements, *i.e.*, what should be included in the "public switched network infrastructure, technology, information, and telecommunications facilities and functions" that must be made available to qualifying carriers by incumbent LECs pursuant to section 259(a). *Notice* at ¶ 9.

Octel's particular concern, under whatever definitions of these terms are ultimately adopted by the Commission, is that its property rights, indeed the property rights of all third party service providers having similar license agreements with incumbent LECs, not be unintentionally trampled by the incumbent LECs' infrastructure sharing obligations. Octel's license agreements with incumbent LECs, by their nature, result in LEC access to Octel report formats, menus, audible prompts, tone and digit sequences, codes, passwords and techniques, all of which constitute proprietary information and trade secrets of Octel and which are the subject of strict nondisclosure provisions in the licensing agreements. Disclosure of this information without Octel's consent, even if allegedly pursuant to Commission infrastructure sharing regulation,

³ Incumbent LECs may then combine Octel's voice processing systems with their own services and sell them as a package to end users.

would constitute a breach of the license agreement between Octel and the incumbent LEC.⁴ The Commission should not promulgate regulations that would force such a breach or any other violation of Octel's legal rights.⁵

The Commission seems to recognize this concern in the *Notice*. For example, the Commission tentatively concludes that in cases where licensed technology is the *only means* to gain access to facilities or functions subject to sharing requirements, section 259 requires mandatory licensing, subject to the payment of reasonable royalties, of any software or equipment necessary to gain access to the shared capability or resource by the qualifying carrier's equipment. *Notice* at ¶ 15. Given the array of voice processing technologies available in the marketplace, it is unlikely that the Commission would conclude that voice processing would be subject to mandatory licensing. If the Commission does so conclude, however, mandatory licensing should be subject to the proprietary information restrictions in the third party providers' licensing schemes.

The Commission specifically addresses the issue of protecting proprietary information only in its discussion of section 259(c)⁶, which concerns disclosure of the deployment of new services and equipment by incumbent LECs subject to the infrastructure sharing requirements. In the context of section 259(c), the Commission seeks comment on the need for safeguards to ensure that "competitively-sensitive,

⁴ Independent of the license agreements, Octel's trade secrets and other proprietary information are protected by patents and U.S. trade secret law. The Uniform Trade Secrets Act, adopted by a number of states, codifies the basic principles of common law trade secret protection. The UTSA defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons which can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *See, e.g.* Cal.Civ.Code § 3426.1(d)(West Supp. 1993), *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 114 S.Ct. 671 (1994). Octel's information falls squarely within this definition.

⁵ Such a result would only create irreconcilable tension between conflicting legal principles and statutory goals. Moreover, the Commission should not displace the commercial licensing process which occurs in the marketplace. Given the availability of voice processing technologies, for example, a qualifying carrier ought to purchase such service from Octel or another vendor independently of its sharing agreement with an incumbent LEC, so that it may combine service elements on its own.

⁶ 47 U.S.C. § 259(c).

proprietary, or trade secret information of the incumbent LEC is not compromised.”


Notice at ¶ 36. The Commission suggests the use of nondisclosure agreements between parties to infrastructure sharing as a means of protecting this type of information. *Id.*

Octel agrees with this basic concept. However, the suggested protection is inadequate. Any protection should go beyond the scope of section 259(c) and be available under all of the subsections of section 259. Proprietary information will not just be included in new or upgraded services and equipment offered by incumbent LECs, it is already incorporated in existing services and equipment.⁷ Moreover, the protections should not apply just to the incumbent LECs bound by infrastructure sharing agreements, but should also extend to third party service providers who have no independent infrastructure sharing obligations under section 259 and may simply be “caught in the web” by virtue of their own license agreements with incumbent LECs.⁸

Octel certainly concurs with the Commission’s regulatory efforts to implement the laudatory goals of the Telecommunications Act of 1996. However, these efforts must not result in the infringement of the legally protected property rights of third party vendors such as Octel.

Respectfully submitted,

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⁷ This proprietary information may be that of the incumbent LEC, or may belong to a third party service provider such as Octel.

⁸ Third party service providers should also be compensated for the disclosure and use of their proprietary information.